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Marie A. Monahan

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TOWARDS A THEORY OF ASSIMILATING LAW STUDENTS INTO THE CULTURE OF THE LEGAL PROFESSION

Marie A. Monahan*

I. INTRODUCTION

The role of skills teaching in law school has been the subject of much debate. Countless articles discuss which skills should be taught in law school, how they should be taught, and whether and how they should be integrated into doctrinal courses.¹ This article focuses on the subject of teaching legal skills within the context of skills-oriented courses. Specifically, legal skills may be introduced to law students intensively in a number of different courses, including legal writing, moot court, trial advocacy, counseling and negotiation, and clinical experiences. Whether a law school curriculum includes all or some of these skills-oriented courses, there is likely to be some overlap of the skills taught. However, various courses address different aspects of the same skills to varying degrees of sophistication. Recognizing this continuum of skills learning in law school education is the first step in creating a curricular environment that maximizes a student's exposure to skills learning. Additionally, adopting a teaching perspective, or pedagogical

* Professor Monahan is an Associate Professor of Law at The John Marshall Law School in Chicago. Professor Monahan holds a J.D. from DePaul University College of Law; a Ph.D. from Northwestern University; M.A., B.A. from SUNY at Buffalo.

1. This article is particularly indebted to Richard K. Neumann, Jr., *Donald Schön, The Reflective Practitioner, and the Comparative Failures of Legal Education*, 6 CLINICAL L. REV. 401 (2000); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35 (1994); and Linda F. Smith, *The Judicial Clinic: Theory and Method in a Live Laboratory of Law*, 1993 UTAH L. REV. 429 (1993). In addition to the scholarship cited in this article, see generally Joel R. Cornwell, *Legal Writing as a Kind of Philosophy*, 48 MERCER L. REV. 1091 (1997); Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933); Joseph Kimble, *Plain English: A Charter for Clear Writing*, 9 COOLEY L. REV. 1 (1992); K.N. Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935); Carrie Menkel-Meadow, *The Legacy of Clinical Education: Theories About Lawyering*, 29 CLEV. ST. L. REV. 555 (1980); Carol McCrehan Parker, *Writing Throughout the Curriculum: Why Law Schools Need It and How to Achieve It*, 76 NEB. L. REV. 561 (1997); Ascanio Piomelli, *Appreciating Collaborative Lawyering*, 6 CLINICAL L. REV. 427 (2000); Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389 (1984).

philosophy, for teaching legal skills enhances the value and underscores the continuity of skills learning for law students.

When I began teaching in law school, I came from the environment of a large law firm, where my ability to write and produce in volume was presumed. I enjoyed writing and had a great deal of experience with legal writing and analysis at both the trial and appellate level. Therefore, translating this ability or body of knowledge to a class of legal writing for students seemed a very natural transition for me.² I began teaching Lawyering Skills I, a course that focuses on the objective memorandum, and Lawyering Skills II, a course that focuses on persuasive documents like a trial memorandum or appellate brief.³

At that time, my primary goal was to communicate to students the exact composition of documents or texts. I always worked from a sample document, which I made available to students, and explained, almost compartmentally, what each section looked like, how long it might be, and what its purpose was within the whole text.⁴ My pedagogical intention was to make sure that my students knew what was expected of them, and I tried to accomplish this by communicating very simply and clearly about what a legal memorandum or brief looked like. I was successful in accomplishing this goal because students generally

2. Having worked within the construct of a large firm, I was familiar with the constraints under which many lawyers produce legal writing. On a daily basis, trial court memoranda and appellate briefs were assigned as additional tasks to be completed in between attending courtroom hearings and depositions. Although time constraints were obstacles, they were never an excuse for anything less than effective performance. To cope with the pressing demands of time and performance expectations, I viewed my writing as formulaic, i.e., each document had its own rhythm and format. Thus, my writing process had a strong mimetic characteristic that enabled me to finish and to succeed. For a commentary on the practical realities of legal writing within the law firm context see George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitor*, 86 MICH. L. REV. 333, 341-42 (1987).

3. At The John Marshall Law School in Chicago, the curriculum requires four writing courses: 1) Lawyering Skills I, a three-credit, first semester course that addresses the objective (intra-office) memorandum; 2) Lawyering Skills II, a three-credit, second semester course that addresses persuasive memoranda, including both the trial court memorandum and the appellate brief; 3) Lawyering Skills III, a two-credit course, usually taken during the third semester that focuses solely on appellate brief writing and oral argument; and 4) Lawyering Skills IV, a two-credit course, generally taken in the fourth or fifth semester, that addresses the drafting of various legal documents, such as wills, contracts, pleadings, and client letters. I have taught Lawyering Skills I, II, and IV at The John Marshall Law School.

4. See HEATHER LEAL ET AL., INTRODUCTION TO ADVOCACY: RESEARCH, WRITING AND ARGUMENT 30, 40 (Heather Leal et al. eds., 6th ed., 1996) (noting that there are "recognized conventions" for brief writing and that briefs follow "traditional patterns").

commented that I was very clear and that they knew how to write for "Monahan."⁵ What I did not know, but found out sometime later, was that my teaching perspective was very traditional. I taught a product-centered classroom employing the textual perspective of teaching students how to write.⁶

Over the years, my teaching perspective has changed and has come to incorporate different perspectives or theories for teaching legal skills. After directing a judicial externship program, I decided to focus more on the context of legal practice and, therefore, to employ the social perspective of teaching both to legal writing and to clinic courses.⁷ This article, which arises from my experience in teaching legal skills, both in the context of legal writing and clinical courses, analyzes different pedagogical approaches for teaching legal skills.

The purpose of this article is to propose a unified perspective of teaching legal skills courses and to show how mastery of legal skills progressively educates students from the initial academic experience in legal writing to the threshold of practice in a clinical program. This paper concentrates on skills teaching in legal writing and judicial externship courses. Specifically, this article will: (1) identify the legal skills taught in legal writing and judicial externship courses; (2) discuss

5. While it is somewhat humorous for students to "psyche out" their professors, from a serious perspective, their ability to do so corresponds to an understanding of audience and purpose. See Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1092 (1986) (stating that "if we describe legal writing as professional writing that has specific and and [sic] definable aims and audiences, then we can define good legal writing as writing that effectively fulfills its aim and meet its audience's needs"); see also Gopen, *supra* note 2, at 340-41, (discussing the difficulty of writing for hostile audiences in the legal profession). The "hostile audience" includes senior partners, judges, or opposing counsel, all of whom read the text with a view towards its deficiencies or vulnerabilities. *Id.*

6. See Kearney & Beazley, *infra* note 41, at 888 (discussing the product method of teaching writing); Kissam, *infra* note 41, at 138-39 (same); Phelps, *supra* note 5, at 1092-93 (describing the textual perspective as applied to legal writing).

7. See Menkel-Meadow, *supra* note 1, at 556-58 (discussing the micro and macro theories of lawyering within the context of clinical teaching). Menkel-Meadow summarizes these theories as: "micro theories, which focus on the role and behaviors of the individual lawyer, and macro theories, which focus on the lawyer's interaction with the legal system, and the impact of lawyers on the larger world." *Id.* at 556. My teaching within the clinical context of a judicial externship program focused very much on these theories. For example, I explored the extern's role and the process of becoming a lawyer (issues corresponding to a micro theory of lawyering), and the descriptive context within which the extern learns and the influence of the legal profession on the extern and vice versa (issues corresponding to a macro theory of lawyering). These theories correspond very closely to the individual (micro) and social (macro) perspectives of teaching writing as discussed in section III of this article.

different teaching approaches with a focus on the social perspective; and (3) introduce various teaching techniques that are effective methods of acculturating law students into the practice of law.

II. DESCRIPTION OF TWO SKILLS-ORIENTED COURSES: LEGAL WRITING AND JUDICIAL EXTERNSHIP

Legal writing and the judicial externship are courses in law school that focus primarily on the teaching of legal skills. Legal writing courses must cover certain fundamental concepts, including the mastery of writing particular legal documents, the use of authority, and proper citation form. However, these fundamental concepts are taught within the broader context of skills training. In fact, a legal writing course is the beginning of a law student's exposure to the skills needed for the effective practice of law.

Similarly, in judicial externship courses, knowledge of certain fundamental concepts is necessary for success. For example, a basic understanding of civil procedure and motion practice is helpful to a judicial extern. However, the overriding goal in an externship involves mastery of skills such as communication and time management.

While both courses impart a mastery of similar legal skills, they do so at different times in a law student's career and to different degrees. The following sections review the goals and content of the legal writing course and the judicial externship course from the perspective of developing skills education in law school.

A. *Legal Writing*

Most law schools offer a legal writing course or courses to teach students how to write objective and persuasive legal memoranda. Objective legal memoranda include an intra-office memorandum while persuasive legal memoranda include a trial or appellate court brief. Whether taught as a separate course or courses, or taught as part of a doctrinal course, instruction regarding the writing of the objective and persuasive memoranda usually takes place during the first year of law school. Additionally, many law schools offer instruction on legal drafting as part of a legal writing course or as part of a seminar in a particular area of the law.⁸ If the drafting course is breadth-oriented, it may address numerous documents such as a legislative statute, a will, a contract, various pleadings, and perhaps a client letter. If the course is depth-oriented, it may address a limited number of documents as they

8. See *supra* note 3.

pertain to a particular area of the law. For example, in a seminar on employment discrimination, students might draft an employment contract, a pleading, or a client letter pertaining to litigation arising out of the employment relationship.

Generally, no matter how a law school curriculum addresses legal writing, formal instruction takes place predominantly during the first year. One of the goals of a legal writing course is to teach students how to write a particular kind of document, such as an objective memorandum, a persuasive memorandum, or a formally drafted document particular to a subject matter.⁹

Each of these legal writing courses, although a skills-oriented course, also presents an opportunity to teach fundamental legal concepts just as a doctrinal course communicates the substantive concepts and rules of a specific area of law.¹⁰ For example, in a doctrinal course like contracts, students must first learn the body of contract law, its substantive rules and doctrines, before they can fully appreciate the policy and theory behind those laws. Similarly, in a legal writing course, students must be introduced to fundamental concepts and rules that distinguish legal writing as a field. Knowledge of these fundamental concepts is a preliminary step in a legal writing course where knowledge of the conventions of the law, such as a mastery of the body of legal writing

9. While courses such as advanced seminars with a writing requirement, moot court, trial advocacy, law reviews and journals, clinic courses, and counseling and negotiation courses continue to refine a student's legal writing ability throughout law school, formal instruction dedicated solely to writing is generally offered during the first year of law school. The legal writing textbooks recognize that their audience is the beginning law student. A brief look at the table of contents of these texts shows a consistent pattern of first chapters devoted to very basic material introducing the law student to the practice of law and its unique style of writing. See, e.g., CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 1-85 (2d ed. 1994) (Part I: Introduction to the Legal System: Chapters 1-5); RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING* 1-46 (3d ed. 1998) (Part I: Introduction to Law and Its Study: Chapters 1-4); HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* 1-27 (4th ed. 1999) (Chapter I: Introduction to the Legal System and Legal Writing).

10. See Phelps, *supra* note 5, at 1101 (noting that legal writing is substantive, finding its source in the fields of composition and rhetoric). Phelps maintains that:

Legal writing can be taught: it is not remedial, but substantive. As long as legal writing is taught as process and with regard to rhetorical situations, it matters little whether the subject is taught as a separate course or as part of another first-year course. By recalling rhetoric from exile in legal writing, as has been done in composition studies, we can redefine legal writing as something we do rather than some thing. We can re-vision legal writing as a verb rather than a noun and alter the way we teach legal writing as well as the way we see ourselves as legal writers.

Id.

conventions, must precede their implementation.¹¹ However, what are the fundamental concepts and rules of legal writing?

Legal writing courses identify the following fundamental concepts: (1) the formal elements of different types of legal documents; (2) research and use of authority; and (3) proper citation form.¹² The first fundamental concept of legal writing is identifying the formal elements of a legal document. As stated previously, the primary goal in a legal writing course is to teach students how to master the writing of a specific document. Although students are taught the principles of analytical legal writing, as employed in an objective or persuasive memorandum, or the principles governing the drafting of a will, a contract, or other formal document, they first need to know what the form of the text should be so that they have some notion of where to begin. Legal writing textbooks often include sample documents illustrating effective analysis and textual format.¹³ Although some legal documents may share common principles of writing (i.e. technique or purpose) they all look very different.¹⁴ For example, a will is immediately distinguishable from a memorandum in support of a motion for summary judgment. An experienced lawyer would only have to look at the two documents to know which is the will and which is the brief. This is possible because legal documents have formulaic structural patterns that experienced lawyers easily recognize.¹⁵

Before students can learn how to master a particular kind of writing, they must understand the nature of the text they are about to write. In the study of literature, focusing on a genre and its conventions is helpful both to literary critics who seek to understand and analyze the text, and to creative writers who seek to emulate a text. Certain substantive knowledge is essential to identify genres in literature. For example, tragedy is distinguished from other genres by the nature of the hero, the tone, and the purpose of the piece.¹⁶ Specifically, Ancient Greek tragedy

11. See Rideout & Ramsfield, *supra* note 1, at 66 (describing the law as “a discourse, constituted as a social practice and subject to its own set of discourse conventions, argumentative patterns, and interpretive strategies”).

12. See generally CALLEROS, *supra* note 9 (stating that in most first year legal writing classes the topics include document format, citation form, and research strategy); NEUMANN, *supra* note 9 (same); SHAPO, *supra* note 9 (discussing traditional notions of research and citation strategy).

13. See, e.g., NEUMANN, *supra* note 9, at 419-79 (appending examples of an office memorandum, client letter, motion memorandum, appellant’s brief, and appellee’s brief).

14. LEAL, *supra* note 4, at 29-56 (describing and giving examples of the general format for common legal documents that are identifiable by their format alone).

15. *Id.*

16. Northrop Frye, *First Essay: Historical Criticism: Theory of Modes*, in ANATOMY OF CRITICISM 33-42 (1957) (classifying fictional literature into what he describes as

takes its plot from myth, and follows the rise and fall of a great hero within the solemn context of antiquity, whereas Shakespearean tragedy follows the rise and fall of a hero in the context of the Renaissance. Additionally, although different texts within a given genre may vary depending upon circumstances and time, the structural elements of the text are fixed or defined by the genre. Therefore, within the genre of tragedy, each text has its own formal elements that serve to identify it as part of that particular genre. For example, while the social or temporal context of Greek and Shakespearean tragedy may differ, the actual text of a Greek tragedy is characterized by formal elements that are not dissimilar to the formal elements of a Shakespearean tragedy.¹⁷

Knowledge of these formal structures gives students the ability to identify the text that they will attempt to analyze or create. Similarly, legal writing is a genre that is characterized by the conventions of legal practice, including precedent and a formal and businesslike tone. Knowledge of the formulaic, structural patterns of a particular legal document provides a tangible reference to use as a point of departure.¹⁸ Therefore, in the field of legal writing, while a motion to dismiss that was written thirty years ago would include many of the same formal elements as a motion to dismiss written today, i.e., a caption, an introduction identifying the party bringing the motion, references to pertinent rules, and a prayer for relief, the choice of language and the policies underlying the argument may be very different because the temporal context has changed.¹⁹

In addition to the formal elements of a legal document, a legal writing

“modes” or content-based categories; specifically, he addresses the “high mimetic” mode of tragedy).

17. *Fourth Essay: Rhetorical Criticism: Theory of Genres*, in *ANATOMY OF CRITICISM* 243 (1957) (discussing the concept of genre from a rhetorical basis, focusing not only on the form of a literary piece, but also on the relationship between artist and audience).

18. NEUMANN, *supra* note 9, at 419-79 (including sample documents as references for students to use as models); SHAPO, *supra* note 9, at 406-25 (including sample office memoranda and a memorandum in support of a motion). Patricia Bizzell discusses the aspects of a sample or model text.

19. PATRICIA BIZZELL *Cognition, Convention and Certainty: What We Need to Know About Writing*, 3 *PRE/TEXT: THE FIRST DECADE* 65, 77 (1982). (explaining that a community’s conventions may be discovered from analysis of a community’s texts; however, these conventions are not arbitrary, but are part of an historical process). Similarly, in legal writing, the use of archaic language or surplusage may in fact be described more as a convention belonging to a different historical discourse group, rather than bad legal writing. See, e.g., RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (4th ed. 1998) (dispelling many conventions of the legal practice (legalese) that most effective legal writers seek to avoid).

course must focus on other fundamental concepts such as legal research, proper use of citation form, and correct use of legal authority. In both objective and persuasive memoranda, legal authority for a given point is indicated in the body of the text through primary or secondary legal citation. Although footnotes are rarely used in legal texts, the use of citations is frequent.²⁰ Students must learn that citation to authority is essential to the credibility and strength of their argument. Students must also learn that the manner by which lawyers make reference to legal authority is conventionalized, even considered a language unto itself.²¹ Thus, to write like a lawyer, law students must learn the language of citation form, acquire a sophisticated understanding of how to conduct legal research, and know when reference to authority is required.

Although legal writing instruction has a substantive component, the hallmark of teaching such writing is a focus on skills uniquely associated with the practice of law. Some of the skills-oriented goals of a legal writing course include: 1) developing a writer's persona; 2) mastering legal research and legal analysis; 3) communicating; and 4) considering ethical issues. These skills will be addressed in detail in Section IV.

B. The Judicial Externship

Another skills-based course is the judicial externship.²² In judicial externships, second and third year law students are placed with state and federal court judges for whom they work as a law clerk.²³ Students attend courtroom hearings, sit in on pre-trial or settlement conferences, write bench memoranda or draft opinions, confer with their assigned judge, and advise the judge regarding issues on cases to which they have been

20. DARBY DICKERSON, *ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION* 293-300 (Ass'n Legal Writing Dirs. 2000) (Rule 44.0 - Citation Placement and Use).

21. The following texts are used as citators for legal publications: (1) *THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION* (Columbia Law Review Ass'n et al. eds., 16th ed. 1996) (*Bluebook*); (2) *THE UNIVERSITY OF CHICAGO MANUAL OF LEGAL CITATION* (Univ. of Chicago Law Review et al. eds., 1989) (*Maroon Book*); and (3) *ALWD CITATION MANUAL*, *supra* note 20 (*ALWD*).

22. The following clinic courses are offered at The John Marshall Law School: 1) the Fair Housing Clinic; and 2) externships, such as the judicial externship, lawyering practice, litigation practicum, innocence clinic, patent strike force, and immigration law. Many of the same principles set forth in this article apply equally well to these and other clinic experiences.

23. For an excellent explanation and analysis of the judicial externship see Smith, *supra* note 1, which discusses the clinical theory, goals, structure, and classroom component of a judicial externship and its evolving nature.

assigned.²⁴ Students work on active files or cases set for hearing by their judge, as opposed to theoretical issues that might arise in a classroom. Students witness courtroom practice, talk with judges about courtroom procedures and theories of law, and write about and analyze issues in an effort to assist judges in the resolution of judicial matters.²⁵

Just as legal writing courses are primarily skills-based, so are judicial externships. However, just as there are fundamental concepts that define a writing course, there are fundamental goals of a judicial externship course.²⁶ First, students must acquire proficiency with researching and writing a bench memorandum, as well as drafting judicial opinions and orders. Because the externship follows their legal writing course, students have experience in drafting objective and persuasive memoranda. These skills are a helpful resource in drafting judicial memoranda.²⁷ Secondly, the externship affords students the opportunity to observe and learn courtroom practice and procedure. Students often observe jury selection, assist the judge with motions in limine, participate in the motion practice, sit in on pre-trial conferences, and attend impression hearings with the judge and the judge's law clerk. These experiences ground the extern in the rules of civil procedure and courtroom policy that are essential to the practice of law. These concepts are difficult to learn from a descriptive classroom explanation.²⁸ Finally, a goal of the judicial externship is to acquaint the student with the role of the judiciary. In law school, students spend most of their time reading and analyzing appellate decisions. In the externship, students have the opportunity to discover how judicial opinions evolve from the procedural and political aspects of judicial deliberation.²⁹

Proficiency with a written document, knowledge of courtroom procedures, and an understanding of the judiciary are the first level of

24. For an explanation of the role of a judicial extern, and of a law clerk, see REBECCA A. COCHRAN, JUDICIAL EXTERNSHIPS: THE CLINIC INSIDE THE COURTHOUSE 8-11 (1995) where the author describes the responsibilities and ethical considerations attendant to law clerks and compares them to those of an extern.

25. *Id.* at 93 (discussing decision-making and the role of the extern in this process).

26. Smith, *supra* note 1, at 438-41 (noting the four benefits of the judicial externship: (1) improving skills of legal writing and analysis; (2) gaining knowledge of procedural rules in practice; (3) acquiring knowledge of the decision-making process; (4) becoming aware of the complexity of the adversary system).

27. *Id.* at 439 (discussing the various kinds of written assignments an extern may work on and how each of these assignments refines research, writing, and analytical skills).

28. *Id.* at 442, 451-52 (commenting on the value of actual experience of the live clinic setting).

29. *Id.* at 454 (noting that the clinical setting allows students the opportunity to become familiar with the operation of a court as an institution).

learning in a judicial externship. In addition to these goals, the externship includes skills-oriented goals. Specifically, the judicial externship allows students to gain a mastery of various skills, including: (1) organization and management of work; (2) problem solving; (3) effective communication; (4) recognizing and resolving ethical dilemmas; (5) improvement of analytical and research skills; and (6) development of a professional persona.³⁰ Each of these skills is necessary in a successful legal practice. Exposure to tasks that challenge a student's mastery of these skills allows students to think and act like lawyers. As a result, the judicial externship allows students to begin to develop their own professional identity which, ideally, is the ultimate goal of the course.³¹

In contrast to a legal writing class, the judicial externship experience occurs primarily outside of the classroom. Externship courses, however, have a classroom component, which facilitates the externship and reinforces the development of various skills.³² The externship presents a live opportunity for students to test and practice their skills under the guidance of the judge, as mentor, and the clinic professor, as coach.³³ When a judge assigns a project to a student, it is the student's responsibility to discern how to allocate his or her time, where to do the work, how to communicate any difficulty with the project to the judge, whether to seek outside advice from a professor, law clerk, fellow student, or the judge, how to maintain confidentiality, and how to treat the judge's staff with respect and civility. Presumptions and misunderstandings can impede this process. However, with a

30. J.P. OGILVY, ET AL., *LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS* 113-35, 173-227 (1998) (discussing structural details of a judicial externship program, such as the nature of the relationship involved and the maximization of the learning experience from participation and observation).

31. See generally Stewart Macaulay, *The Judge As Mentor: A Personal Memoir*, 36 J. LEGAL EDUC. 144 (1986) (describing the ongoing value of the skills and values learned in an externship and the beginning of a professional persona through a close learning relationship with a judge); Abner Mikva, *Judicial Clerkships: A Judge's View*, 36 J. LEGAL EDUC. 150 (1986) (same).

32. Smith, *supra* note 1, at 450-52; see also Stacy Caplow, *From Courtroom to Classroom: Creating an Academic Component to Enhance the Skills and Values Learned in a Student Judicial Clerkship Clinic*, 75 NEB. L. REV. 872 (1996).

33. Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 726-27 (1989) (addressing the topic of critique, which the author notes is: (1) a discussion of the students' performances; (2) an art; and (3) a skill that can enhance creativity). The author's observations apply equally well to the discussions between the professor-extern and judge-extern in a clinic setting. *Id.*; see also Donald A. Schön, *Educating the Reflective Legal Practitioner*, 2 CLINICAL L. REV. 231, 233 (1995) (considering the distinction between the theory of the classroom and the reality of practice in professional education and particularly in legal education).

conscientious judge as mentor and an adequate classroom component, the judicial externship gives the student a great opportunity to grow and mature into a responsible and professional lawyer.³⁴

III. TEACHING APPROACH: A UNIFIED PERSPECTIVE OF SKILLS TEACHING

Skills training is a required component in many professional schools. Graduate programs in medicine, architecture, nursing, education, and music all have a practicum or field experience that is required to obtain a degree.³⁵ In law school, skills training may be required with regard to some legal writing classes; but, a required field experience is very rare.³⁶ In fact, legal scholars have noted that rather than be considered as part of the required curriculum, clinical education is often marginalized.³⁷ Ideally, an effective skills curriculum would be integrated, not only with other skills courses, but also within the entire curriculum. Skills learning would be viewed as a continuum of mastering the same skills, but in different courses and at different levels.³⁸ Students would begin with an introduction to legal skills in their legal writing courses and during the course of law school, they could advance to the threshold of practice in an intern-like clinical experience, like the judicial externship.

To effectively integrate skills learning, however, a law school needs to have a unified perspective in the teaching of legal skills. A helpful source for a perspective on teaching skills is the field of composition theory. In an article on non-academic writing, composition theorist, Lester Faigley, identifies three theoretical perspectives on teaching writing: the textual perspective, the individual perspective, and the social perspective.³⁹

34. OGILVY, *supra* note 30, at 1-9, 29-48 (exploring learning from experience and supervision in the context of the legal externship).

35. See Neumann, *supra* note 1, at 414-15 (describing the value of "reflective practica" in architectural design studio, psychotherapy, medicine music, and athletics).

36. *Id.* at 424. Neumann states:

[A] high proportion of students graduate from law schools without any genuine exposure to a reflective practicum. In the typical law school, only one skills course is required, and it is generally the most under funded course in the school (legal writing). The law school accreditation standards require a school to offer, on an elective basis, some "live-client or other real life practice experience . . . through clinics or externships," but the school need only offer such a course; it does not even have to satisfy student demand for it.

37. *Id.* at 417.

38. See Robert MacCrate, *Preparing Lawyers to Participate Effectively in the Legal Profession*, 44 J. LEGAL EDUC. 89, 89-90 (1994) (noting the concept of skills learning "along an educational continuum" beginning in law school and continuing into practice).

39. Lester Faigley, *Nonacademic Writing: The Social Perspective*, in WRITING IN

Faigley notes that these perspectives "represent general lines of research . . . [and are] collections of approaches, collapsed and simplified . . . for purposes of comparison."⁴⁰ These perspectives serve as a filter or philosophy through which legal writing can be taught.

Legal writing scholars have applied these theories to teaching legal writing.⁴¹ However, the theories apply equally well to the teaching of skills in a broader context throughout the law school curriculum. This section focuses on the textual, individual, and social perspectives of writing. However, this paper will concentrate on the social approach, which is particularly effective for teaching skills because it focuses on context. In legal teaching, the context is the legal profession. By adopting a pedagogical philosophy of skills teaching that incorporates the textual and individual perspectives into the social perspective, a law school would effectuate a skills curriculum that is unified and effective. For example, legal writing courses would focus on the social context of legal practice and teach students to develop a writer's persona.⁴² In clinic

NONACADEMIC SETTINGS 231 (Lee Odell & Dixie Goswami eds., 1985) (discussing different theoretical approaches to writing and focusing on the social perspective and its foundations in culture and society). Faigley regards this theory as well-suited to non-academic writing, and in this regard his opinions are particularly helpful to teachers of legal writing.

40. *Id.* at 233; see also Richard Young, *Paradigms and Problems: Needed Research in Rhetorical Invention*, in RESEARCH ON COMPOSING: POINTS OF DEPARTURE 29, 30 (Charles R. Cooper & Lee Odell eds., 1978) (defining paradigm: "For those working within a discipline, a paradigm is an eye to see with").

41. See Rideout & Ramsfield, *supra* note 1, at 66-75 (discussing the use of social perspective). While no one scholar may adopt or represent only one perspective, the following examples are given as illustrations of the textual, individual, and social perspectives. For an example of the textual perspective as applied to legal writing, see SHAPO, *supra* note 9; HENRY WEIHOFEN, LEGAL WRITING STYLE (2d ed. 1980); WYDICK, *supra* note 19. For a scholarly comment on the textual perspective as applied to legal writing, see Mary Kate Kearney & Mary Beth Beazley, *Teaching Students How to "Think Like Lawyers": Integrating Socratic Method with the Writing Process*, 64 TEMP. L. REV. 885 (1991); Philip C. Kissam, *Thinking By Writing About Legal Writing*, 40 VAND. L. REV. 135 (1987); Phelps, *supra* note 5, at 1089. For examples of legal writing textbooks that primarily adopt an individual perspective, see LINDA H. EDWARDS, LEGAL WRITING: PROCESS ANALYSIS, AND ORGANIZATION (2d ed. 1999) and NEUMANN, *supra* note 9. Finally, for legal commentary on the social perspective as applied to legal writing, see STANLEY FISH, DOING WHAT COMES NATURALLY 87-140 (1989); JAMES BOYD WHITE, HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW (1985); and Joseph Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1 (1991). For examples of textbooks adopting the social perspective, see CALLEROS, *supra* note 9; DIANA V. PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH (3d ed. 1999); and JILL J. RAMSFIELD, THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS (2000).

42. See, e.g., Rideout & Ramsfield, *supra* note 1, at 64 (analyzing the role of classroom dialogue on students' development of a writer's persona and professional

courses, students would actually enter into the social context of the profession and develop a professional persona.

A. *The Textual Perspective*

Scholars of composition and rhetoric define the textual perspective as one that focuses on the end product, or the text.⁴³ Instruction focuses on what the text tells the writer or requires the writer to do, rather than on the process the writer engages in, or the context within which the writer and the text function.⁴⁴ Concepts such as clarity, organization, format, length, word choice, syntax, punctuation, and voice act as constraints on the writer and must be followed in order to achieve an appropriate text. One scholar describes the textual perspective as follows:

The primary concerns of linguistics and literary criticism during much of the twentieth century have been the description of formal features in language and texts. Following from the assumptions of these traditions, much writing research has analyzed features in texts. This line of inquiry has long been dominant in the study of business and technical writing Results of these studies would be used to make generalizations about specific kinds of texts—generalizations that are sometimes stated prescriptively as rules for style and format.⁴⁵

When applied to legal writing, the textual approach is appealing because legal texts are formulaic documents.⁴⁶ Convention dictates both the inclusion of certain sections of a legal text and the placement of those sections. Components within a trial brief are characterized by their content and their placement within the text. For example, the “request for relief” usually does not include citations and is placed at the end of the document, while the “question presented,” which states the legal issue in one sentence, is placed at the beginning.⁴⁷ In fact, upon simply viewing a legal memorandum or brief, an experienced attorney can quickly tell if the document is intra- or inter-office, or if the brief is an appellate or trial level document. Therefore, standard formal elements, such as the document’s component parts and their order, must be present for a legal text to comply with traditional concepts of legal writing. This

voice).

43. Maxine Hairston, *The Winds of Change: Thomas Kuhn and the Revolution in the Teaching of Writing*, 33 C. COMPOSITION & COMM. 76, 78 (1982).

44. *Id.*

45. FAIGLEY, *supra* note 39, at 233-34.

46. See generally LEAL, *supra* note 4.

47. See Rideout & Ramsfield, *supra* note 1, at 49-50 (discussing the textual perspective and its adaptability to legal writing conventions).

focus on the formulaic structure of a legal text has been commented on by one legal scholar as follows:

Headings and subheadings are common in legal writing. In briefs, not only is each of the major parts indicated by its appropriate heading, such as "Statement of the Issues," "Statement of Facts," or "Argument," but each point in the argument is given a heading. In other documents, such as legal memoranda, similar mechanical aids can be used. The run-in paragraph heading is helpful for breakdown into smaller segments. In instruments such as contracts, some lawyers hesitate to use paragraph titles because they fear that a court may read a brief and inadequate title as part of the document. But any danger of this can be met with a simple recital to the effect that "Paragraph headings are inserted for reference only and form no part of this agreement."⁴⁸

Although the textual perspective of legal writing is helpful to students because it makes the objectives and goals of their process visually clear, the perspective is limited to the extent that it is exclusive of the process the writer undergoes and it is arbitrary unless the context of the product or text is explained.⁴⁹ When students do not understand the format or fail to follow the format effectively, they have difficulty understanding what to do next. After all, when students are presented with a format to follow, and they believe they followed it, why should they do more? This hypothetical dilemma underscores the fact that more than a roadmap is necessary for students to master the skill of legal writing.⁵⁰ Students need

48. WEIHOFEN, *supra* note 41, at 140.

49. See YOUNG, *supra* note 40, at 35-36 (describing the current traditional paradigm in composition theory, which this article refers to as the textual perspective). Young explains:

[I]mportant changes have occurred in the discipline: composition is now being examined as a process It is no accident that the shift in attention from composed product to the composing process is occurring at the same time as the reemergence of invention as a rhetorical discipline. Invention requires a process view of rhetoric; and if the composing process is to be taught, rather than left to the student to be learned, arts associated with the various stages of the process are necessary. The changes are important not only because they are responsive to a long-standing need unmet by the current-traditional paradigm, but also because they are incompatible with some of the paradigm's basic features. They are challenges to the continuing viability of the paradigm.

Id.

50. See Rideout & Ramsfield, *supra* note 1, at 49-51 (noting that the textual perspective (current traditional paradigm, product-centered classroom, formalist view) was used predominantly in law school for teaching legal writing well into the 1980's). However, the authors emphasize that its effectiveness is limited:

We do not mean to imply that a focus on the clarity and accuracy of the text, and

to be guided through the process of legal writing, which is a new kind of writing they learn in law school.

B. The Individual Perspective

The individual perspective of writing focuses on the writer as opposed to the text.⁵¹ Both the writer's sense of self-expression and the actual conduct and thought pattern the writer engages in are the focus of this perspective. A final written text is regarded as the endpoint along a recursive continuum of different writing activities in which the writer is involved. These activities include thinking, outlining, writing, rewriting, editing, and rethinking. Under this perspective, a writer's need to communicate is paramount, with a writer's idiosyncratic voice (as opposed to the text of the end product) driving the process.⁵² A composition theorist has summarized the individual perspective with this description:

For researchers who take the individual perspective, a text is not so much an object as an outcome of an individual's cognitive processes. The primary attention shifts away from the text to an individual writer's emerging conception of the writing task. Researchers taking the individual perspective would likely examine how writers make certain choices during composing. They would inquire about writer's goals in composing, either by retrospective interviews or by asking writers to voice their thoughts while they composed. They would consider how an individual's formulation of a writing task directs the production of the resulting text.⁵³

The individual perspective is instructive to students of legal writing because it emphasizes the fact that legal writing is a new and different kind of writing and that students need practice and experience in this new idiom of expression.⁵⁴ A difficult experience for students of legal

on the careful development of its subject matter, is wrong; especially in a discourse like law, with its reliance upon written texts and their precision and thoroughness, this focus is essential. Rather, this perspective, when used as the primary focus for instruction, omits important considerations in legal writing and its instruction and shortchanges our students.

Id. at 50.

51. See Linda Flower & John R. Hayes, *A Cognitive Process Theory of Writing*, 32 C. COMPOSITION & COMM. 365 (1981).

52. See Phelps, *supra* note 5, at 1090 (discussing the importance for the legal writer to develop a "professional voice," and further describing the idea of a finished legal text as arising from an authentic voice); see also BIZZELL, *supra* note 19, at 215-17.

53. FAIGLEY, *supra* note 39, at 235.

54. Kissam, *supra* note 41, at 136 (discussing a perspective of legal writing that

writing is the discovery that even though they apply all of the knowledge and success they have previously experienced in writing courses and follow the instructions of their legal writing professor, they still may fall short of an optimal result. Legal writing and thinking are learned through a recursive process which begins during a three-year period in law school and continues throughout the professional career of an attorney.⁵⁵ The process of internalizing the style, rhetoric, and methods of legal writing comes through repetitive practice, which in the first year of law school translates to the revision and editing of a legal document.

Law students, especially first semester students, are very surprised and impatient with the necessary transition into the legal writing process. Instruction that focuses only on the textual perspective is not helpful in acclimating students into a new idiom or dialogue. A teaching approach that focuses solely on product often leads to students' frustration, anxiety, and, ultimately, hostility towards the instructor as well as the profession. By incorporating the individual perspective together with the textual perspective, students realize that they are not alone and that a well-written legal document is not the result of genius or rigid adherence to formula.

An example of approaching writing as a process is contained in the following story. During the first semester in law school, a professor assigned her legal writing class its first assignment. During the course of the assignment, one student would come to the professor's office two or three times each week with questions regarding the assignment. After the student's paper was returned and he received the highest grade in the class, the professor questioned him in detail about his writing process and he indicated that he had worked through thirteen different revisions of the assignment. The student provided the professor with a copy of all thirteen documents. The professor brought the pile of rewrites to her class and commented that the pile represented the work done by one of their colleagues on the previous assignment. She explained to the class that the pile represented the process, slow and self-examining, that the particular student went through before arriving at an acceptable text from his perspective, and ultimately from her perspective.⁵⁶

focuses on the writing process "as an important source of substantive thought").

55. *Id.* at 135 (proposing that writing is a process of critical reflection that begins in law school).

56. See Phelps, *supra* note 5, at 1094-97 (describing writing as: (1) a process; (2) rhetorically based; (3) evaluated by the fulfillment of a writer's intention and the audience's needs; (4) a disciplinary creative activity; and (5) underscored by linguistic research).

Because the individual perspective helps students realize that their writing will involve a process of work that is new, slow, and reflective, this perspective is helpful to student legal writers who are having difficulty translating their former success with writing into legal writing. In most instances, students' previous writing allowed for creativity through broad statements often supported only by personal opinion.⁵⁷ When students attempt to apply their creativity to legal writing, however, it appears that creative observations and opinions have little value.⁵⁸ Once students understand that their observations need to be founded in an accurate assessment of the law, e.g., a judge's reasoning or a statutory provision, their process of becoming a creative legal writer begins. Additionally, when students realize that they are engaged in a new process, the process of legal analysis, they can develop the foundations of legal writing. Two legal scholars describe their implementation of the individual perspective as follows:

Engaging legal writing students in a Socratic dialogue is useless unless the legal writing assignments are structured around writing process principles. Teachers who use the product method, responding only to final, finished drafts, intervene in their students' thought processes too late: the students have already finished their thinking and writing, and have no opportunity to remedy the problems identified by the feedback. Using the writing process allows the teacher to "stop time" and respond to early drafts. The teacher can then intervene in the students' thought processes and ask Socratic questions while the students are formulating their legal analysis. The students learn because they must use their teacher's feedback to figure out what is wrong with their writing and fix it.⁵⁹

Although the individual perspective is useful in acculturating law students into the new context of legal analysis and writing, it is limited

57. See Williams, *supra* note 41, at 10 (discussing the challenge facing legal writing professors to teach new "habits of thinking to counter the habits of everyday thinking that students bring with them from their undergraduate training in literature, philosophy, history, chemistry, sociology, etc. . .").

58. Phelps, *supra* note 5, at 1096 (discussing the "new rhetoric," a paradigm for teaching writing founded in the individual (process) perspective, as consistent with originality and creativity because it recognizes that writing is a process that is both "rational" and "intuitive"; most importantly that it can be taught by providing "students with methods of inquiry that aid them in probing the nonrational parts of their minds"); Rideout & Ramsfield, *supra* note 1, at 59-60 (noting that most law students struggle with the notion of a "loss of originality" due to an unfamiliarity with the conventions of the law and the creativity afforded by those conventions through legal argument).

59. Kearney & Beazley, *supra* note 41, at 890.

because of the self-indulgence on which it is based.⁶⁰ Focusing primarily on process misleads law students to think that as long as they are engaged in the process, their efforts should be rewarded notwithstanding the outcome. However, this is not the case in the world of law, where the operative effect of a legal document is determined more by adherence to traditional formal requirements in combination with effective analysis than the amount of effort it may have taken to produce it. Therefore, while the individual perspective aids students in understanding that they are learning a new and a different dialogue, it is only a vehicle of coping with this new context; it does not explain the context.⁶¹

C. *The Social Perspective*

The social perspective of writing focuses on the context in which a text is generated.⁶² Under this theory, the context of a given culture, i.e., the political, economic, religious, or social norms of a group impel the text. One way cultural ideologies are communicated within a group is through language, which is characterized by syntax, vocabulary, and usage. The force of language and its effect are unique to a defined group. Thus, an understanding of language as it operates within the social context of the group from which a particular text emerges instructs the reader as well as the writer.⁶³ This view of text and culture has been called the social perspective of writing:

The social perspective . . . focuses on the process of composing, but this perspective understands process in far broader terms. In the social perspective, writing processes do not start with “prewriting” and stop with “revising.” Researchers taking a social perspective study how individual acts of communication define, organize, and maintain social groups. They view written texts not as detached objects possessing meaning on their own, but as links in communicative chains, with their meaning emerging from their relationships to previous texts and the present context. The social perspective, then, moves beyond the traditional rhetorical concern for audience, forcing researchers to consider issues such as social roles, group purposes, communal organization, ideology, and finally theories

60. See BIZZELL, *supra* note 19, at 66-68 (setting forth limitations of the individual perspective, including its narrow, too “inner-directed” approach); Rideout & Ramsfield, *supra* note 1, at 56-57 (suggesting that the individual perspective works best in legal writing contexts when combined with a broader perspective like the social perspective).

61. Rideout & Ramsfield, *supra* note 1, at 56-57.

62. See FAIGLEY, *supra* note 39, at 235-36.

63. *Id.*

of culture.⁶⁴

The social perspective is extremely adaptable to teaching legal writing because the law is a profession where the language is specialized, where procedure is dictated by detailed rules, where dress is so traditional it is almost codified, where ethical conduct is set forth in regulations restricted to lawyers, and where the occurrence and manner of recreational socializing are even normalized by customs within different practice groups. A new member of this group, for example a first year law student, is easily recognized as a novice because mastery of the social norms takes both time and exposure to the whole group.⁶⁵ Teaching law students the skills of lawyering requires instruction and initiation into the world of the legal profession, an emergence into a new discourse group, with new paradigms of reasoning.⁶⁶ An effective method of teaching legal writing, therefore, is to communicate to students an acknowledgment and respect for the context of the legal practice community. The social perspective, as applied to teaching legal writing, has been described as follows:

Learning to write, within this perspective, entails something of a "Catch-22." One must master the conventions of a discourse in order to be a member of that discourse community and, hence, an accomplished writer within that discourse; but those

64. *Id.*

65. See Williams, *supra* note 41, at 13 (defining expert (professional) thinking as successful socialization). Williams explains:

Expertise does not exist in a vacuum; it is a social construct. The concept of expertise cannot exist independently of a community of knowledge. The knowledge about which one is considered by others to be expert is developed, defined, evaluated, maintained, and transmitted by those in the community who are qualified to make judgments about what counts as expertise. If that is so, then we acquire expertise not in a vacuum, but as novices who must be socialized into a community of knowledge, into a community of discourse by those who constitute the community. The process of becoming an expert is at least as much a social process as an exercise of individual effort and intellect. Put this way, expert thinking is successful socialization.

Id.

66. See *id.* at 9 (describing successful socialization into a discourse community). Williams maintains:

Good thinking and good writing are not the natural outcome of natural growth but rather a set of skills that can be deliberately taught and deliberately learned in a context that we can describe as a "community of knowledge" or a "community of discourse." Good critical thinking/writing in general or good thinking/writing in a particular field does not simply happen as a result of a person's mind maturing, but is a consequence of experience gathered by working with others more experienced in some particular discourse community.

Id.

conventions are, by definition, known only to members of that discourse community. They are the linguistic and rhetorical substrata that create the group. Learning to write as a lawyer writes means, in a very real sense, becoming a lawyer. When we teach people how to write, we are teaching them word choice, organization, or even composing habits; but we are also inevitably leading them into the strategies and conventions of a particular discourse and thus offering them membership into that discourse community. Thus, we should see their mistakes and confusion, more often than not, as signs that they are struggling to find their way into that discourse.⁶⁷

Because of its practical focus on context, the social perspective of teaching is helpful not only in the limited context of skills training in legal writing courses, but also in the broader context of skills training such as clinical courses. Both writing and clinic courses focus primarily on skills instruction; legal writing instruction allows students to develop a legal writer's persona and clinical experience allows students to develop a professional persona. While legal writing courses generally introduce the novice to the legal world, clinical teaching is a bridge between law school and legal practice. Students in a clinic course work on real world issues, but their activity is supervised and regarded as instructional as opposed to profitable.⁶⁸ Students in a judicial externship experience a liminal existence between law school and practice. While working for a judge, students write draft opinions, advise the judge, and attend hearings and conferences; yet, they pay tuition for this learning opportunity and are supervised and mentored both by a judge for whom they work, and the professor who teaches the course.⁶⁹ The clinical setting immerses a

67. Rideout & Ramsfield, *supra* note 1, at 58.

68. See Linda Morton et al., *Not Quite Grown Up: The Difficulty of Applying an Adult Education Model to Legal Externs*, 5 CLINICAL L. REV. 469 (1999) (proposing a unifying paradigm for teaching law students, recognizing that while law students are "adults," they undergo great personal and professional growth in law school).

69. See Ann Shalleck, *Clinical Contexts: Theory and Practice in Law and Supervision*, 21 N.Y.U. REV. L. & SOC. CHANGE 109, 178 (1994) (setting forth a "vision of supervision," a theory of the supervisory relationship between the student and professor in a clinical setting). Shalleck's description of that "vision" is very similar to the individual perspective as applied to teaching (supervising) legal writing:

The vision [of supervision] is perhaps best contained in . . . a process in which the teacher is constantly identifying those aspects of the law, lawyering and the legal system that are critical to an understanding of what it means to be a lawyer. The issues that the teacher frames are the most important for supervision (the decisions) and the ways that she chooses to view those issues (the contexts) create a complex and constantly shifting scheme requiring the teacher's constant attention to the fundamental assumptions underlying each choice she makes.

Id. at 178-79.

student into a controlled setting within the legal profession. The language and culture of the legal profession act upon the student and the student begins to socialize himself within this new context.

In the judicial externship course, students are confronted daily with dilemmas ranging from very banal issues, such as what to wear, to more serious questions of confidentiality or conflict.⁷⁰ The classroom component, which includes individual meetings with the clinical professor, helps students to adapt to the real world of practice.⁷¹ When students are engaged as colleagues within the practice and advised in a serious and respectful way, they are better able to accept whatever challenges they face. Teaching students how to behave as lawyers gives them comfort and confidence within the clinical context. Clinical education can be described as the actualization of the social perspective. Therefore, the clinical focus on context complements legal writing instruction because the contextual nature of clinical education extends skills instruction. Additionally, the clinical focus on context allows students to realize that legal writing is only one skill in a continuum of skills that are taught in law school.

As mentioned above, one method of teaching legal writing is the textual perspective which is highly formalistic and focuses primarily on textual format and structure.⁷² While this is helpful to students, it is

Shalleck also discusses the fact that although the teacher defines the educational goals, the students have access to the "process" during which they "examine lawyering theories, skills, social theories, institutional critique, and personal feelings within the framework of their cases." *Id.* at 180.

70. Janet Motley, *Self-Directed Learning and the Out-of-House Placement*, 19 N.M. L. REV. 211, 212-14 (1989) (describing the opportunity for professional development through externship); Henry Rose, *Legal Externships: Can They Be Valuable Clinical Experiences for Law Students?*, 12 NOVA L. REV. 95, 106-10 (1987) (discussing lawyering theories and practice in an externship setting intended to promote competent, reflective professionals); Robert F. Seibel & Linda H. Morton, *Field Placement Programs: Practices, Problems and Possibilities*, 2 CLINICAL L. REV. 413, 447-49 (1996) (setting forth the pedagogical value of externship programs based upon a survey of such programs).

71. See Smith, *supra* note 1, at 446-50 (noting the value of communication between student and faculty during the externship); Nina W. Tarr, *Current Issues in Clinical Legal Education*, 37 HOW. L.J. 31, 38-39 (1993) (noting the parallel experiences of an "in-house" and extern clinical experience). But see Gary Laser, *Significant Curricular Developments: The MacCrane Report and Beyond*, 1 CLINICAL L. REV. 425, 437 (1994) (regarding the externship experience as secondary to an "in-house" clinic).

For a practical and anecdotal discussion of the importance of a mentor, see Robert Clifford, *All Lawyers Face Urgent Need for Restoration of Mentoring*, CHICAGO LAWYER, May 1994, at 11. Clifford describes mentoring as "not a mere transfer of information or advice," but instead "a relationship filled with nurturing, tension, inspiration, generosity, [and] reciprocity." *Id.*

72. See Hairston, *supra* note 43.

limited because it is not instructive to the student who, perhaps tied to a different context, fails to grasp the format of a particular legal document.⁷³ Also, because of its rigid and strict adherence to textual format, the textual perspective inhibits creativity and adaptability in the writer.⁷⁴ In order to adapt a type of text to a particular audience, the writer needs to understand the context of the audience. If a law student's audience is the general legal community, the student would need to understand the practice norms of that community.

The individual perspective helps students to some degree because it recognizes the writer's inner voice and encourages the writer by acknowledging the act of writing: the recurrent process of thinking, writing, rewriting, and rethinking toward an endpoint. The writer's inner voice and the process impel the product as opposed to the product controlling the writer. The individual perspective works as an intermediary step in skills learning because it informs the student that mastery of skills is part of a long recurrent process that has room for individuality and creativity. However, with regard to skills training viewed in a broader context, both the textual and the individual perspectives are defined by legal practice and therefore are most effective when used together with the social perspective.

Therefore, viewing legal writing as only one part of skills teaching

73. See Gopen, *supra* note 2, at 334-40 (discussing what he deplorably regards as the "possible causes of traditional legal style"). Gopen cites obfuscatory legal style or jargon, the problem of precedent, and the insularity of lawyers that makes them a tribe unto themselves as just a few of the reasons why the writing of lawyers is poorly regarded. *Id.* at 336, 338-39. However, these exclusive characteristics of legal writing are not inherently destructive or negative. Rather, because lawyers are limited by their context, which is the world of legal rules or the law, and they are writing primarily for other lawyers, becoming a lawyer results in writing that will not be understood by non-lawyers, no matter how plainly written, because it will always be tied to the club of attorneys who know the law and how to express its rules in language. See *id.* at 339-40. For example, when a doctor writes a prescription for medication to be taken three times a day, the meaning of the prescription is understood in a very elemental way by the non-doctor patient, who would know the name of the medication, how often to take it, and how to take it. See *id.* However, a doctor would understand a deeper level of meaning that would include knowledge of the patient's illness, weight, and symptoms that could be deduced by looking at the same prescription. See *id.* Therefore, although the plain meaning of the prescription (text) would be available to the patient (lay person), only a member of the relevant club would have access to a deeper or more expanded meaning and significance of its words. See *id.*

74. See Phelps, *supra* note 5, at 1096 (proposing a new legal rhetoric, as an alternative to the "current-traditional paradigm" or textual perspective because writing is a "rational and intuitive process that can be taught" and that once legal analysis is learned, creativity can occur); Rideout & Ramsfield, *supra* note 1, at 59-60 (noting the limitations of the formalist (textual) perspective).

strengthens the teaching of legal writing because it places it within the broader context of skills teaching in law school and defines it in conjunction with the other skills courses necessary to prepare law students for the practice of law.⁷⁵ Under a unified perspective of skills teaching that incorporates the textual, individual, and social perspectives, clinic courses incorporate and continue the goals of legal writing courses. While the first year law student struggles to adapt to the idiosyncrasies of legal writing and thinking within the fictional world of the open and closed memorandum, the second and third year law student employs this new language in the externship, which allows the student to refine written and analytical skills within the context of the courtroom. The judicial externship course allows students to employ the goals learned in legal writing.⁷⁶ The course prepares the more experienced student, who is at the threshold of practice, for the realities of the legal profession and places skills teaching within a continuum of learning in law school through interconnected courses related by a common perspective, rather than through a disjointed and competing set of courses with separate goals.⁷⁷

IV. NEXUS OF SKILLS

The skills taught in law school are not unique to a particular course; rather, a number of different courses teach the same skills. Legal writing courses and the judicial externship course both address the following skills: ethical dilemma resolution, time management, legal analysis, legal research, factual investigation, problem solving, and communication. A legal writing class offers one context within which to introduce these skills to law students early in their career, and the judicial externship presents another context. The externship is much closer to that of actual practice, yet it acculturates students to the very same skills. This section of the article focuses on the teaching techniques that effectively impart

75. Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing From the MacCrate Report – Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. 593, 601 (1994) (discussing the law as both a science and an art and applauding a development in legal education where legal science (doctrine and theory) and legal realism (skills) can be united in an effective way).

76. *Id.* at 618-19.

77. Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 CLINICAL L. REV. 401 (1994) (discussing the pedagogical and practical difficulty of bridging the gap between law school and the legal profession); Ruta Stropus, *Mend It, Bend It, and Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. U. CHI. L.J. 449, 482 (1996) (stating that law students need variable methods of teaching to learn).

overlapping skills in both of these courses.

A. Ethics and Time Management

In both legal writing courses and in judicial externship courses, a billing exercise can be employed to teach students how to manage their time and how to record that time ethically.⁷⁸ In legal writing courses, an effective exercise is to require students to prepare a bill for one of the documents they have completed. Students are advised to record all time spent on a memorandum, including researching, writing, rewriting, editing, thinking, and consulting time. Students are then required to bring their bills into class, and the class compares the differences in the bills submitted. A student, elected as secretary of the class session, has the responsibility to record, on the blackboard, the different number of hours recorded for each task itemized in the students' bills. So, for example, one bill entry might read "wrote memo . . . fifteen hours," while other bills may have more delineated categories such as "initial review of facts . . . one hour"; "consult with student colleagues . . . forty-five minutes"; "wrote first draft of statement of facts . . . one and one-half hours." The secretary of the class session writes down each entry as a billing category heading and under that heading reports the varying times spent by individual students. As a class, students discuss the significance of the differences of time and the varieties of headings.

This exercise is effective for a number of reasons. First, it develops a camaraderie among the students in the class. Students realize that their colleagues were working just as hard or long as they were, and that other students also had difficulty with the same things in the assignment. Second, the exercise encourages students to sort out tasks, rather than seeing their time as a long dreary blur. Students realize how they spent their time and that they worked on a number of different tasks at different times. The billing exercise also helps students to see that writing is a process and that an effective final product is the result of recurrent rewriting and rethinking.⁷⁹

A similar exercise can be used in judicial externship courses. In this class, students are required to keep detailed time sheets of their work during the course. During individual interviews with each student, the

78. For a discussion of the ethical dilemmas facing lawyers with regard to billing practices, see Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999); Kevin Hopkins, *Law Firms, Technology, and the Double-Billing Dilemma*, 12 GEO. J. LEGAL ETHICS 95 (1998).

79. See Phelps, *supra* note 5, at 1100-01 (discussing the amount of effort needed for effective legal writing).

clinical professor discusses a student's time sheets. Generally, students will under-record the hours they spent on a project because they think they have spent too much time on it due to their inexperience. A professor should emphasize the importance of accuracy with regard to time sheet recordation to these students.⁸⁰ Students are not experienced lawyers, so it is expected that the time they spend on a given assignment would be greater than that of an experienced lawyer. This realization results in the student's greater awareness of his or her value as an attorney. Even though the time sheet may reflect a more than an ideal amount of time spent on a project, the time sheet is still part of a law school course and reflects a student's actual time and effort. Just as the billing exercise instructs writing students on time management, requiring judicial externs to keep time sheets helps them to recognize the multiple tasks they perform. By reviewing the timesheets students may be able to identify some work that could have been accomplished more efficiently and some that was completed well. Discussion about time sheets allows students to conduct a self-examination regarding individual time management.⁸¹

Finally, a time recording exercise in both writing and clinic courses presents an opportunity to discuss ethical considerations regarding clarity of billing.⁸² It is important to stress clarity in time recordation. Over-billing or under-billing often results from a generalized recollection of work that was performed. When legal work is set forth in specific terms, related to specific tasks, the reliability of a bill is enhanced. A humorous example of one student's experience is the following time sheet entry: "two hours . . . lunch with judge, very interesting conversation." When the student was asked to clarify whether this was a social event or work, the student was unsure, perhaps because lunch was so tasty and free. However, when asked if any time during lunch was spent talking about a

80. Because this billing exercise is done in the context of a law school class, it may be the first time a student has actually drafted a legal bill and even more likely the first time a student has thought of billing as an ethical issue. This exercise provides an opportunity to introduce students to the American Bar Association's Model Rules of Professional Conduct Annotated Rules 1.5 and 7.1, which discuss both fee guidelines and communications concerning a lawyer's services, respectively.

81. The use of time sheets parallels the use of journals in clinic courses; however, the goal of using time sheets is time management and ethical billing practices as opposed to the goal of self-reflection attendant to journals. See J.P. Ogilvy, *The Use of Journals in Legal Education: A Tool for Reflection*, 3 CLINICAL L. REV. 55 (1996).

82. See *id.*; Hopkins, *supra* note 78; Lerman, *supra* note 78. The pressures on new lawyers for meeting billable hours requirements at law firms is great and carries with it great temptation and responsibility. See generally Chief Justice William Rehnquist, *The Legal Profession Today*, 62 IND. L.J. 151 (1987).

file, the student replied: "Yes! We spent the whole time talking about the summary judgment motion that was up that afternoon."

*B. Legal Analysis, Legal Research, Factual Investigation,
Communication*

Lawyers research and analyze legal problems and then communicate the results of that process either in writing or orally. A lawyer masters these skills over the course of his career, with daily practice.⁸³ Two simulated exercises can be used in skills courses to develop awareness and mastery of these important skills. In a legal writing class, students can conduct a simulated deposition. For the open memorandum writing assignment, when students are first learning to do legal research, the professor can assign a problem with a skeletal statement of facts. After students have had time to review the problem and begin their research, motions can be made from the class to depose any witnesses or parties the class agrees upon. Students can play the role of the deponents, who will testify, lead counsel, who will conduct the requested depositions, and the court reporter who will transcribe the deposition testimony. During the next class, lead counsel takes the deposition with a prepared list of questions, and follow-up questioning is conducted by the class at large. The court reporter records the depositions, and a copy is given to each student. The deposition transcripts are made part of the "record," i.e., the fact pattern that forms the basis of the open memorandum.

Students enjoy this simulated deposition exercise because they get to play the role of an attorney during their first semester, and because it gives them some control over the assignment. From the beginning of the memorandum writing assignment, the students identify with the problem and their client's needs. Moreover, students learn through experience that factual investigation and communication skills depend on their knowledge of the law. Only after students begin their research, and have some understanding of the theory of law the problem presents, can they ask legally relevant questions to discover legally dispositive facts. Once students develop an abstract legal theory that applies to their case, they are able to investigate the concrete factual basis necessary for effective analysis.

In the judicial externship class, these same skills can be taught in a simulation allowing one student, playing the role of the judge, to discuss

83. Daniel J. Givelber, et al., *Learning Through Work: An Empirical Study of Legal Internship*, 45 J. LEGAL EDUC. 1, 32-34 (1995) (discussing the instructional value of law firm work experience for law students and the ongoing nature of skills education both as students during law school and as practicing lawyers at law firms).

a draft opinion written by a student, playing the role of extern. The student who plays the extern gives a draft opinion (that has already been filed to avoid confidentiality issues) to the student-judge who critiques the opinion for the extern and asks for certain changes. The extern is given the opportunity to respond to the judge. The whole class observes while the interview develops. After the interview, the class critiques the interview. Students learn from this simulation because they are allowed to analyze and criticize another's writing. The students also learn to maintain a professional demeanor during circumstances that might involve criticism or confrontation. The exercise allows students to discuss appropriate judicial demeanor as well as reflect on what they consider helpful mentoring and collegial skills. Students show their professional growth during this exercise because they are able to discuss their own experiences with the class, and can explain how they maintained a professional demeanor during a stressful experience.⁸⁴

C. Problem Solving

Another helpful teaching technique in both legal writing and judicial externship courses is the individual interview.⁸⁵ In both courses, it is effective for the professor to set the agenda during the first interview. In this interview, the professor can discuss any preliminary issues that have been identified with regard to a student's writing or any problems that may have arisen with regard to a particular extern's placement. By keeping the tone of the interview professional but caring, students can relax into their own professional identity and feel comfortable enough to seek the help or advice they need. In the externship course, the professor functions as an intermediary between the law school and student on the one hand, and the profession and the judge on the other. The professor takes on a quasi-collegial role and expects the extern to conduct himself in a similarly professional and respectful manner.⁸⁶ The

84. See Donna C. Chin et al., *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing*, 51 RUTGERS L. REV. 889 (1999) (discussing the topic of civility and integrating instruction on professionalism into the law school curriculum); Thomas D. Morgan, *Law Faculty as Role Models*, and Roger I. Abrams, *Law School as a Professional Community in Teaching and Learning Professionalism*, 37-64 (Symposium Proceedings, American Bar Association, Section of Legal Education and Admissions to the Bar, 1997) (same); Brenda Smith, *Civility Codes: The Newest Weapons in the "Civil" War over Proper Attorney Conduct Regulations Miss Their Mark*, 24 DAYTON L. REV. 151, 182 (1998).

85. Harriet N. Katz, *Using Faculty Tutorials to Foster Externship Students' Critical Reflection*, 5 CLINICAL L. REV. 437 (1999) (discussing the value of tutorials in clinic teaching).

86. It is important for law students to realize that civility is an important part of

relaxed atmosphere almost always results in open and frank discussions regarding problems the extern may have faced. In the legal writing course, especially during the first year, the tone of the interview should be caring yet formal. The professor's role is not an intermediary. Rather, the professor will be giving students a letter grade that will affect their grade point average. In addition, the professor will teach the students that what they thought was great writing needs great improvement to succeed as legal writing.

After the first conference, students should set the agenda of each additional meeting. This is an extremely valuable way of teaching students; it gives students a feeling of responsibility and self-determination. Students decide what they need help with and they can use the interview to resolve those problems. The interview requires students to articulate their problems and it invites them to regard the professor as their advocate, someone who wants to help them, and allows them to talk about themselves and their attitude towards their writing or their extern placement.⁸⁷

Students will often reveal concerns during the individual interview that they are reluctant to share with a whole class. For example, in a tutorial with a writing student, a student may reluctantly admit that he or she had spent hours on a research question, one that was intended to take only ten to fifteen minutes to resolve. Similarly, in the extern program, problems can be resolved during the individual interview that would be inappropriate to address in the classroom. For example, a student once left a note under her professor's door saying that she was going to drop the externship course in mid-semester because she felt too overwhelmed by law school, law review, and the externship. The professor met with the student individually, as did the judge, and together the three of them resolved the matter in a way that allowed the student to complete the

effective criticism and competition. For a discussion of the mimetic quality of incivility and how it inhibits discourse, see Leonard J. Schrager, *Civility Yields Success*, 13 CBA RECORD 8 (1999).

87. In the externship course, which often is a Pass/Fail course, the student is more likely to see the professor as a quasi-colleague, rather than as the ultimate arbiter of the student's work because the anxiety levels over the student's grade is diminished by the Pass/Fail designation of the course, and the fact that the judge is the ultimate authority on the quality of a final text or task. See generally Smith, *supra* note 1, at 446-50 (discussing the oversight role at the law school in regard to judicial clerkships). In a legal writing course, which is graded, it is more difficult but still possible to direct the student towards a focus on his or her writing and writer's identity, as opposed to viewing the professor as the arbitrary repository of the "answers" and the "grade." Phelps, *supra* note 5, at 1100 (discussing the process of the teacher acting as a guide in a student's process of learning to make "informed rhetorical choices").

course and maintain her high level of performance in her other law school endeavors.⁸⁸ Therefore, the individual interview trains students to take the initiative (to leave the note), to identify problems (to meet with her professor and the judge), and to have the confidence to work through these problems (to remain in the externship course), all in a professional and responsible manner.

D. Communication

Communication skills involve not only the ability to communicate ideas well, whether in writing or orally, but also the ability to assess the audience and adapt the communication to a particular individual or setting. The ability to communicate effectively allows lawyers to resolve problems efficiently with minimum stress, misunderstanding, or hostility.⁸⁹ Collaboration is a teaching technique used to teach communication.⁹⁰ Students are encouraged to collaborate with each other about their writing assignments, even though they are in the highly competitive environment of law school, where they will be graded individually for their final work product. The practice of law is highly competitive and confrontational, yet lawyers often must confer with other attorneys. Collaboration requires students to have the confidence to choose a discerning colleague who is trustworthy and the ability to communicate the legal dilemma clearly. Collaboration also encourages students to be collegial and to see themselves within the larger context of fellow professionals with whom they can share ideas, dilemmas, and problems.

In the judicial externship course, collaboration can be encouraged by conducting a roundtable discussion at the very end of the course to consider the value of the externship course. The discussion may focus specifically on the skills students have learned during their externships. For this exercise, students can be given a copy of the section of the MacCrate Report that lists "Fundamental Lawyering Skills."⁹¹ Students

88. Williams, *supra* note 41, at 14-15. (maintaining that students are overwhelmed by their "new community" of law school, and need help with "the anxiety, insecurity, strangeness, etc., that accompanies all ventures into new social space").

89. MacCrate, *supra* note 38, at 90 (discussing the importance of communication as both an oral and written skill).

90. David F. Chavkin, *Matchmaker, Matchmaker: Student Collaboration in Clinical Programs*, 1 CLINICAL L. REV. 199 (1994) (discussing the value of collaboration); Phillip C. Kissam, *Conferring with Students*, 65 UMKC L. REV. 917 (1997) (same).

91. American Bar Association Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development – An Educational Continuum, Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, at 138-41 (1992) (listing the "fundamental lawyer skills").

can then discuss whether their placement was a valuable experience in light of the various skills listed. The most rewarding part of this exercise is that students have their own war stories to tell. The students discuss with their extern colleagues the kinds of experiences that they had during the course of the externship, e.g., what they did for or talked about with their judge. This is a great step forward for law students, from the very first memorandum they write in a legal writing course in the vacuum of law school, to learning how to go to a judge's chambers and say: "I think I can help you," to "this is what I wrote for the judge," to "this is how I dealt with the judge when she criticized me." The opportunity to discuss the skills they learned in the externship course underscores the importance not only of the skills themselves but of each student's individual awareness of his or her mastery of them.

V. CONCLUSION

Because the same legal skills are taught in legal writing and clinic courses, the courses work together as a progression in skills development. First, the law student is introduced to new paradigms in legal writing through various written and simulated exercises. Next, the student progresses to a more context-based skills education in clinic through both simulated exercises and actual experience of supervised placements within the practice. By adopting a unified perspective of skills teaching that focuses on the social perspective, while also being cognizant of the value of the textual and individual perspectives, an integrated skills curriculum allows law students to become immersed in the culture of the legal profession.